

O'CONNOR BERMAN DOTTS & BANES
 Second Floor, Nauru Building
 Marianas Business Plaza
 1 Nauru Loop
 Susupe, Saipan, CNMI
 Mail: PO Box 50-1969 Saipan MP 96950
 Phone: 234-5684
 Fax: 234-5683
 E-mail: attorneys@saipan.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT
 FOR THE NORTHERN MARIANA ISLANDS**

AE JA PARK ELLIOT,

Plaintiff,

vs.

JARROD MANGLOÑA, et al.,

Defendants.

Civ. No. 07-0021

MOTION TO STRIKE

**Date: April 10, 2008
 Time: 8:30 am**

Plaintiff Ae Ja Park Elliot hereby moves the Court to strike the third and fourth paragraphs of Section V, and all of Section VI, of Defendants' Reply To Plaintiff's Opposition To the Motion To Dismiss the Second Amended Complaint (filed in this matter March 27, 2008), and not to consider any argument on the issues raised therein, for the reason that these issues (*viz.*, whether the rights asserted by Plaintiff are "clearly established" for purposes of qualified immunity; and whether the "public duty doctrine" bars Plaintiff's local law claims), although mentioned in highly cursory fashion on pages 4 and 17 of Defendant's opening brief in support of its motion, are supported by no argument or authority whatsoever therein, and are instead now argued for the first time in the Reply Brief. *See generally* United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992) (court noting that it will not ordinarily consider issues raised in a reply brief that were not "specifically and distinctly argued" in the opening brief).

Defendants' original argument for qualified immunity was limited to the "threshold question" of whether there had been any violation of a constitutional right in the first place. They

1 argued, quite simply, that there had not been. See Defendants' Motion to Dismiss and Incorporated
2 Memorandum of Points and Authorities (filed January 31, 2008) at 17. Only now, in their reply, do
3 Defendants venture any discussion of the second step of the analysis – *i.e.*, whether the right violated
4 was “clearly established.” See Reply at 8-9. Similarly, their original argument for dismissal of the
5 local law claims was that, once the federal claims were dismissed, the local law claims would
6 predominate, and should be decided by the local courts. See Opening Brief at 17-18. They
7 mentioned the “public duty doctrine” in passing, *see id.* at 17, but never discussed its relevance to
8 this case, or even attempted to define it, until their reply. See Reply at 9-10. Thus, neither issue was
9 “specifically and distinctly argued” in the opening brief. Indeed, neither was argued at all.

10
11 Having been raised belatedly, and without opportunity for a response by Plaintiff, these
12 issues should not be considered by the Court, which should instead decide the motion as Defendants
13 initially framed it in their Opening Brief.

14
15 Respectfully submitted this 9th day of April, 2008.

16
17 O'CONNOR BERMAN DOTTS & BANES
18 Attorneys for Plaintiff

19
20 By: _____/s/_____
21 Joseph E. Horey

22 3268-01-080408-PL-motion to strike.wpd
23
24
25
26
27
28